First Periodic Country Report: Portugal

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Introduction

This report is based on an exhaustive survey of all the judicial decisions on the European Arrest Warrant (EAW) published in the official websites run by *Instituto de Gestão Financeira e Equipamentos da Justiça, I.P.*[1], *Conselho Superior da Magistratura*[2] and *Tribunal Constitucional*[3].

The authors have identified and assessed 41 decisions of the Constitutional Court and 253 judgments/decisions uttered by the common courts[4] in the timeframe between the entry into force of the PT LEAW in 2003[5] and 20 April 2021 (judgments published at a later date could only exceptionally be taken into consideration). Apparently, it is not possible to determine the statistical significance of that figure, because the governmental entities who manage judicial statistics do not have data on the total amount of judgments/decisions on the EAW[6]. Moreover, the criteria used to select the judgments/decisions for publication in the mentioned websites do not seem to be publicly available.

Given the purpose of STREAM, the authors have chosen the topics that, in their view, bear a closer connection with individual rights[7], together with other topics suggested by the coordination: issuing authority and its

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1 www.dgsi.pt

2 https://jurisprudencia.csm.org.pt. References to judgments and decisions with an ECLI identifier were gathered in this website; the sign (*) means that no ECLI identifier is available.

3 https://www.tribunalconstitucional.pt

4 In Portugal, the courts competent for executing EAWs are the five High Courts, corresponding to the five judicial districts (Coimbra, Évora, Guimarães, Lisboa and Porto), which, in common (civil and criminal) proceedings, are courts of appeal. Their judgments can be appealed to the Supreme Court.

5 Law 65/2003, of 23.8.2003, as amended by Law 35/2015, of 04.05.2015 and Law 115/2019, of 12.09.2019. The EAW regime entered into force in 01.01.2004.

6 Information provided by e-mail (on file with the authors).

7 For a more detailed analysis of the rights granted by Portuguese law to the sought person in the context of judicial cooperation, see COSTA / CAEIRO (2021).

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independence, proportionality, detention, trials *in absentia*, right to translation and other procedural rights, refusal of surrender on the grounds of humanitarian concerns or the protection of human/fundamental rights, dual criminality and life sentences. The reasons for this choice are, in some cases, self-explicative; in other cases, they rise from particular aspects of the transposition of the FD EAW into Portuguese law, which in turn reflect on the jurisprudence on the matter.

The way Portuguese courts have been dealing with warrants for the execution of a penal sanction applied in the *absence of the defendant* bears specific interest, given the peculiar evolution of Portuguese law in this respect. The original *Portuguese* version of art. 5(1) of the FD EAW stated that, concerning trials *in absentia*, surrender could only be granted if the issuing authority provided sufficient guarantees that the sought person would be able to apply for a retrial *or appeal the decision*[8]. The latter alternative was not provided for in the remaining linguistic versions[9], and can only be explained by the circumstance that Portuguese procedural law did and does not provide for a retrial in those cases. It is unclear why and how the particular arrangement of Portuguese criminal procedure got reflected (only) in the Portuguese version of the FD EAW, which in turn was transposed almost literally by art. 13(a) PT LEAW. This regime could be problematic, in cases where Portugal acted as the issuing MS and the executing MS asked for a specific guarantee of a right to a *retrial* – which obviously could not be given. Meanwhile, FD EAW 2009, transposed by Law 35/2015, of 4.05.2015, has introduced a new regime, whereby new art. 4-A (transposed by current art. 12-A PT LEAW) provides for the possibility of a retrial *or appeal*: in a way, the FD EAW 2009 has embodied the Portuguese version of the original text of the FD EAW. How the courts have assessed the fulfilment of the conditions set therein is also noteworthy.

Detention is, in its own right, a topic of paramount interest for individual rights. Adding to that, there is the specific circumstance that Portuguese law has still not transposed art. 23(5) FD EAW (limits of detention), and thus it seems interesting to analyse how the courts have dealt with such flaw.

Dual criminality is an important feature of extradition/surrender law, in that it ensures legal certainty and proportionality of the restriction of the sought person's rights, although there are certain circumstances in which it can be dispensed with[10]. While transposing FD EAW, the Portuguese legislator chose to make surrender for the offences not included in art. 2(2) FD EAW (= art. 2((2) PT LEAW) dependent on dual criminality (art. 2(3) PT LEAW = art. 2(4) FD EAW) in imperative terms ("surrender is admissible only if the act is a criminal offence under Portuguese law"). However, former art. 12(1)(a) PT LEAW (= art. 4(1) FD EAW) enshrined the lack of dual criminality *also* as an optional ground for refusal, and thus Portuguese law was – to the knowledge of these authors – the sole legal order of the EU where lack of dual criminality was *both* a mandatory and an

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8 "Artigo 13.º - Garantias a fornecer pelo Estado membro de emissão em casos especiais

A execução do mandado de detenção europeu só terá lugar se o Estado membro de emissão prestar uma das seguintes garantias:

a) Quando o mandado de detenção europeu tiver sido emitido para efeitos de cumprimento de uma pena ou medida de segurança imposta por uma decisão proferida na ausência do arguido e se a pessoa em causa não tiver sido notificada pessoalmente ou de outro modo informada da data e local da audiência que determinou a decisão proferida na sua ausência, só será proferida decisão de entrega se a autoridade judiciária de emissão fornecer garantias consideradas suficientes de que é assegurada à pessoa procurada a possibilidade de *interpor recurso* ou de requerer novo julgamento no Estado membro de emissão e de estar presente no julgamento" (emphasis added).

9 Noting the disparity between the several linguistic versions and the Portuguese one, see TRL, 11.07.2006 [ECLI:PT:TRL:2006:2134.2006.5.46]; and CAEIRO / FIDALGO (2009), p. 451 f.; CAEIRO / FIDALGO (2015), p. 166 f.

10 CAEIRO (2019), p. 357 f.

optional ground for refusal[11]. This led to disparate and awkward judicial decisions until the legislator eventually repealed art. 12(1)(a) in 2019[12], making clear that dual criminality is, in the designated cases, a legal condition for surrender.

The status of *life sentences* in Portuguese law seems to be unique within the EU and should therefore be addressed (as an obstacle to cooperation). Art. 30(1) CRP prohibits life sentences and sanctions of indeterminate duration, and art. 33(4) prohibits extradition when the requested person incurs such penalties, except where the requesting State provides guarantees that they will not be applied or executed. However, art. 33(5) CRP establishes an exception to the common regime of extradition, stating that the obstacles to extradition set in the previous paragraphs of art. 33 (namely, the applicability of a life sentence or a sanction of indeterminate duration) do not apply to judicial cooperation in the framework of the EU. Therefore, the Constitution allows for the surrender of individuals, pursuant to an EAW, to whom those sanctions can apply in the issuing State (including Portuguese nationals). Nevertheless, (current) art. 13(1)(a) PT LEAW has fully transposed art. 5(2) FD EAW.

The main issue that stands out in this respect is the interpretation of the expression "guarantees" contained in art. 13(1) PT LEAW (= art. 5 FD EAW). Art. 5 FD EAW bears the epigraph "*guarantees* to be given by the issuing Member State in particular cases", but the body of the article states that "the execution of the European arrest warrant (...) may (...) be subject to the following *conditions*" (emphasis added). Only the deleted para. (1) of art. 5 FD EAW provided for the actual issuance of guarantees as a condition for surrender. Paras. (2) and (3) allow for the establishment of conditions, and therefore, after the deletion of para. (1) in 2009, the epigraph of art 5 ("Guarantees...") makes little sense. The problem is that art. 13(1) PT LEAW not only bears the epigraph "guarantees" but also has incorrectly transposed the main body of art. 5 FD EAW, stating that "the execution of the warrant will only take place if the issuing State provides one of the following *guarantees*:" (emphasis added). The mistake has been pointed out[13] but it has not been corrected either in 2015 or in 2019 when the legislator amended PT LEAW. As a consequence, a literal interpretation of art. 13 PT LEAW would lead Portuguese courts to demand actual *guarantees* from the issuing State regarding the *conditions* currently set in para. (1), lit. (a) and (b) (= current art. 5(2)(3) FD EAW) – which the latter is not bound to provide in the light of EU law[14].

The authors bear full responsibility for the translation of quoted Portuguese texts into English, namely legislation and judicial decisions.

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[11] In more detail, see CAEIRO / FIDALGO (2009), p. 455 (fn. 45).

[12] Law n.º 115/2019, of 12.09.2019.

[13] CAEIRO / FIDALGO (2009), p. 450.

[14] Adding to the equivocal wording of Portuguese law, the Supreme Court has created a distinction between, on the one hand, (former) lit. a) and lit. b) of art. 13º PT LEAW (= former art. 5(1)(2) FD EAW) and, on the other hand, former lit c) (= art. 5(3)): the first two norms would require proper guarantees, to be provided before the decision of the executing State, whereas the latter would be a mere condition that might be required or not (see the seminal judgment in STJ, 4.12.2008 [ECLI:PT:STJ:2008:08P3861.95], which has been routinely followed by other decisions). However, it is submitted that the Court has erred since such distinction could only be established between former lit. a) (now deleted), on one side, and lit. b) and c), on the other: see CAEIRO / FIDALGO (2009), p. 450. Indeed, the text of former lit. b) and c) (current lit. a) and b) of art. 13(1) PT LEAW) did/do not allow for the distinction established by the Court and the text of art. 5 FD EAW uses the same exact words for both cases: "[surrender] may be subject to the condition…". This mistaken construction may have contributed, in turn, to the flawed interpretation pursued by most judgments in this regard: see infra Section II, 4.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

I.1. "Issuing authority" and its independence

According to art. 36 PT LEAW, the *competence* to issue a EAW belongs to the national authority who has the (internal) competence to order the individual's detention in that specific stage of the proceedings[15]. Prosecutors are competent to issue an EAW when the case is still at the investigation stage (*inquiry*) and the warrant is issued in order to have the suspect brought before a judge (*juiz de instrução*, *juge des libertés*) for the first judicial hearing (art. 257 (1) CCP). However, if there is the need to impose pre-trial detention, the competence to issue the EAW belongs to the judge (who is also competent to issue the domestic warrant), even during the inquiry (art. 268 (1) (b) CCP). In all other phases of the proceedings, including the execution of the penalty, the competence belongs exclusively to the courts.

As for the *independence* of the Portuguese judicial authorities, the Office of the Public Prosecutor (*Ministério Público*) is an *autonomous* body (art. 219(2) CRP) and prosecutors are *magistrates* (art. 219(4) CRP) whose function is to apply the law. They are not "independent" in the same way as the judges, because they are hierarchically subordinate, but neither them, nor the Office as a body, nor the Attorney-General receive orders or instructions from the Executive or any other political body. Therefore, there seem to be no concerns regarding their independence in the sense that has shaped the jurisprudence of the CJEU (interference of political actors in the issuance of an EAW). To the knowledge of the authors, there has been no instance in which the independence of Portuguese public prosecutors has been questioned, either domestically or abroad.

The concept "issuing authority" has raised two questions in the Portuguese courts. The first was the determination of which domestic court is responsible for issuing an EAW against an inmate who has escaped from prison. Some judgments have ruled that the competence belongs to the sentencing court[16], but others have found that the competent issuing authority is the court responsible for supervising the execution of the sentence (*tribunal de execução de penas*) instead[17]. The second question – what kind of authorities qualify as "issuing authorities" in the eyes of Portuguese courts acting as executing authorities – is dealt with in Section II.

I.2. Proportionality

Proportionality has been used as a determining principle by the Portuguese courts in some instances.

In cases where Portugal was the issuing MS, the main question has been whether the issuance of an EAW for the sole purpose of putting an end to the situation of procedural default (*contumácia*) would be proportional, especially when a custodial pre-trial measure would not be admissible. The courts soon ruled that it would be disproportional to seek the detention in another MS, for at least around 10 days, of an individual who cannot be subject to pre-trial detention under Portuguese law[18].

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[15] A detailed analysis of Portuguese criminal procedure can be found in CAEIRO / COSTA (2012).

[16] TRC, 03.10.2007 [ECLI:PT:TRC:2007:183.99.0TBVGS.A.C1.B8].

[17] TRC, 17.12.2008 [ECLI:PT:TRC:2008:10.06.4TXCBR.C1.61] and TRC, 28.01.2009 [ECLI:PT:TRC:2009: 220.05.1TXCBR.B.C1.B1].

[18] For a thorough explanation, see TRP, 18.03.2015 [ECLI:PT:TRP:2015:612.08.4GBOBR.A.P1.08]; in the same direction, TRC, 21.11.2007 [ECLI:PT:TRC:2007:210.00.0TBTNV.A.C1.9A]; TRC, 05.12.2007 [ECLI:PT:TRC:2007:49.03.1PATNV.A.C1.55]; TRC,

However, the private law division of the Supreme Court reached the opposite conclusion in a rather peculiar case, where the appellant sued the Portuguese State for damages [19]. She was a suspect in certain criminal proceedings but had absconded, failing to inform the authorities of her new address. As a consequence, the Portuguese authorities were not able to notify her of the date of the trial and she was declared in procedural default (*contumácia*), leading to the issuance of an EAW in 2006. Two years later, she was arrested in Germany pursuant to that warrant. She stayed in detention for 12 days, until the Portuguese court cancelled the EAW at her request, on the basis that the Portuguese law in force at the time of the *execution* of the warrant did not allow for her preventive detention anymore. Ruling on the claim for damages, the Supreme Court found that: (i) when the warrant was issued (two years before the arrest), the law allowed for the appellant's preventive detention; (ii) in any case, the legitimacy of the issuance of an EAW does not depend on the possibility, or indeed the intention, to apply a custodial measure to the requested person; the sole purpose of the EAW is to bring him/her before the issuing authority, who will then decide which pre-trial measure should be applied. Interestingly, the same line of reasoning was adopted by the criminal law division of the Supreme Court while ruling on the *execution* of an EAW issued by France (in opposition to the case-law analyzed above, relating to Portugal as the *issuing* State). The Court rejected the argument put forward by the requested person, according to which the EAW would be inadmissible because French law did not allow for preventive detention in that particular case[20].

I.3. Detention to execute an EAW issued by Portuguese authorities

Time spent in detention abroad should be deducted from the sentence, not from the maximum time of pre-trial detention or other preventive custodial measures[21]. In only one case has the court found that detention abroad to execute an EAW issued by Portuguese authorities should be counted in the time allowed for pre-trial detention (in Portugal)[22].

Only the measures that unequivocally cause an actual deprivation of liberty (such as pre-trial detention and house arrest) during EAW proceedings are discounted[23]. That is not the case of the British "conditional bail"[24].

19.12.2007 [ECLI:PT:TRC:2007:266.00.6PATMV.A.20] TRP, 20.10.2010 [ECLI:PT:TRP:2010:321.06.9PBVLG.A.P1.41]. Implicitly in the same direction, the Supreme Court has ruled that it is illegal to apply pre-trial detention to a defendant who has been convicted by Portuguese courts (*in absentia*) to two sentences of less than 3 years imprisonment each when those sentences are not yet final but have not been appealed by the prosecution; "as a consequence", the Court ruled, the issuance of an EAW (for criminal proceedings) springing from that measure is also illegal: STJ, 26.10.2016 [ECLI:PT:STJ:2016:39.07.5TELSB.E.S1.29].

19 STJ, 02.12.2013 [ECLI:PT:STJ:2013:962.09.2TBABF.E1.S2.D3].

20 STJ, 09.05.2012 [ECLI:PT:STJ:2012:27.12.0YRCBR.S1.09].

21 TRP, 09.03.2016 [ECLI:PT:TRP:2016:347.10.8PJPRT.I.P1.D3]; STJ, 24.10.2019, 306/18.2JAFAR-B.S1 (*); STJ, 26.10.2017 [ECLI:PT:STJ:2017:1028.15.1TELSB.A.41]; STJ, 25.09.2014 [ECLI:PT:STJ:2014:103.14.4YFLSB.7B]; STJ, 10.07.2008 [ECLI:PT:STJ:2008:08P2396.D2]. In TRC, 05.07.2017 [ECLI:PT:TRC:2017:24.12.5SJGRD.A.C1.60], the Court found that the time the defendant had spent in detention while attending his trial in Portugal should be discounted in the sentence he was serving in Spain at the time, and not in the future sentence that might result from the proceedings in Portugal.

22 TRP, 24.10.2018 [ECLI:PT:TRP:2018:347.10.8PJPRT.EZ.P1.EC].

23 STJ, 03.01.2013 [ECLI:PT:STJ:2013:19996.97.1THLSB.K.S1.9C]; STJ, 14.02.2013 [ECLI:PT:STJ:2013:19996.97.1TDLSB.L.S1.A8]; STJ, 15.11.2012 [ECLI:PT:STJ:2012:19996.97.1TDLSB.H.S1.AB]; STJ, 21.11.2012, [ECLI:PT:STJ:2012:125.12.0YFLSB.A2]. [NB: all these judgments concern the same case]. This seems to anticipate CJEU, 28.07.2016, C-294/16 PPU [ECLI:EU:C:2016:610], para. 38-47.

24 STJ, 03.01.2013 [ECLI:PT:STJ:2013:19996.97.1THLSB.K.S1.9C]; STJ, 14.02.2013 [ECLI:PT:STJ:2013:19996.97.1TDLSB.L.S1.A8].

If it is not clear from the information provided by the fellow MS that the measure applied meant an actual deprivation of liberty, it will not be discounted[25].

The Supreme Court has rejected a claim of *habeas corpus* filed by a Portuguese citizen detained in the UK under an EAW issued by Portuguese authorities: the Court found that "criminal procedural law is strictly territorial" and "it would be inadmissible, in the absence of a treaty providing for a different solution, to execute in a foreign territory procedural acts belonging to the Portuguese jurisdiction, and vice-versa"[26].

I.4. Other procedural rights of the sought person in EAW proceedings

There was a peculiar case in which the Portuguese Public Prosecutor's Office has appealed a judge's decision to issue an EAW to execute a subsidiary custodial sentence (resulting from the failure to pay a fine), on the grounds that the person sought would not be able to know, in the face of the EAW, that he/she could avoid imprisonment by paying the fine; the appeal was rejected[27].

There are few decisions related to individual rights when Portugal is the issuing State because, in those cases, the part of the cooperation procedure that takes place before the Portuguese authorities is not really autonomous from the main criminal procedure. Unlike what happens with the execution of an EAW, where proper and specific proceedings are put in place abiding by specific rules, the issuance of an EAW is a mere procedural act, inserted within already existing criminal proceedings. That is also why the references to individual rights before the *issuing* Member State are so scarce in the Directives on individual rights in criminal and cooperation proceedings[28] – basically, the right to appoint a lawyer in the issuing Member State and the right to get information to that purpose (art. 10(5)(6) Directive 2013/48/EU) and the right to legal aid (art. 5(1)(2) Directive (EU) 2016/1919). Arguably, to the exception of the proportionality issue, most topics are rather unspecific and could be debated also in a purely domestic setting (internal competence to issue a warrant; discount of time spent in detention abroad; etc.). As a consequence, most rights of the sought person will be exerted within the main proceedings, according to common procedural law. In any case, it is possible to figure out a few specific rights – not addressed by the case-law the authors have found – vis-à-vis the issuance of an EAW: besides the right to a lawyer and legal aid (in the context of the right to "dual legal representation"[29]), the individual has the right to file motions with the issuing court (as it was the case in the situation described above in STJ, 02.12.2013) and the right to appeal the decision to issue the warrant. Interestingly, it is not for the issuing State to provide a translation of the warrant, if need be, to a language the sought person can understand (see art. 3(6) Directive 2010/64/EU).

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[25] STJ, 15.11.2012 [ECLI:PT:STJ:2012:19996.97.1TDLSB.H.S1.AB].

[26] STJ, 01.07.2020 [19/20.5JBLSB-A.S1] (*).

[27] TRC, 05.05.2010 [ECLI:PT:TRC:2010:585.05.5TATNV.A.C1.3B].

[28] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, *OJ* L 280, 26.10.2010, p. 1–7; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ* L 142, 1.6.2012, p. 1–10; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJ* L 294, 6.11.2013, p. 1–12; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJ* L 297, 4.11.2016, p. 1–8.

[29] COSTA / CAEIRO (2021), p. 314. According to some authors, this right is covered by common Portuguese criminal procedure law, namely art. 59(2) and 61(1)(e) CCP (COSTA (2015), p. 74 (fn. 80)). However, those rights (including the right to have a lawyer appointed by the State) are granted only to individuals who have been formally designated as *arguidos* (extensively on this concept, see CAEIRO / COSTA (2012), p. 550 f.) and it can happen that the EAW is issued against a suspect who is not (yet) an *arguido* at that moment in time. Arguably, in those cases, he/she can request his/her designation as such (art. 59(2) CCP), in order to be able to enjoy those rights.

Section II – The execution of EAWs: national judicial authorities as monitors of trust

II.1. Procedural aspects

II.1.1. Issuing authority and its independence

Concerning the competence of prosecutors from the other Member States to issue an EAW, the authors have found no cases where Portuguese courts have refused to execute a warrant on the basis that it had been issued by a prosecutor. In two cases, the issue was deemed moot, because an (issuing) judge had signed the EAW in between the submission of the warrant and the judgment[30]. Finally, there was also a case in which the warrant had been issued by a court and it was argued that the warrant should be refused because the issuing competence belonged to the prosecutor's office[31]; the Supreme Court concluded that the German court was indeed competent and denied the need to request a preliminary ruling from the CJEU.

In some judgments, the courts resorted to the guidance of the CJEU. In one case, the defence argued that the appealed executing Court had failed to check whether the French prosecutor was competent, under French law, to issue the warrant, and therefore it could not be said that the latter had been issued by a competent judicial authority to the effects of the FD EAW. The Supreme Court rejected the argument of the defence on the basis that the French prosecutor was clearly a judicial authority (rather than administrative) and that the concept of judicial authority "refers to European Law, rather than to the law of the issuing or executing MS", thereby following, albeit implicitly, the judgment of the CJEU in cases C-508/18 and C-82/19 PPU, *OG and PI*[32].

In another case, the defence raised specific concerns about the *independence* of the issuing authority. The requested person argued that the French prosecutor's office could be given instructions by the political bodies and therefore did not qualify as an issuing authority. The Court quoted extensively and explicitly followed the reasoning of the CJEU in joined cases C-566/19 PPU and C-626/19, *JR and YC*, and found that the French prosecutors should be considered as independent (and therefore competent) because they are only subject to the law and the principle of impartiality[33].

II.1.2. Proportionality

The judgments of Portuguese courts on their competence to assess, as executing authorities, whether or not the issuance of a EAW complies with the proportionality principle are quite diverse.

In the first set of situations, the suspects sought to argue that issuing an EAW to conduct a criminal prosecution was disproportional. The Portuguese courts ruled that the assessment of whether or not the EAW was a

[30] TRE, 30.10.12 [ECLI:PT:TRE:2012:142.11.7YREVR.E1.F8] (EAW issued by Spain) and STJ, 19.07.19 [ECLI:PT:STJ:2019:1728.19.7YRLSB.A.A4] (EAW issued by Germany). In the latter case, the Supreme Court applied the case law of the CJEU (CJEU, 27.05.2019, Joined cases C-508/18 and C-82/19 PPU, *OG and PI*) to the effect of finding that the German prosecutor did not qualify as a judicial authority; however, as mentioned in the text, the issue was rendered moot.

[31] STJ, 15.01.2020 [ECLI:PT:STJ:2020:370.19.7YRPRT.S1].

[32] Compare STJ, 09.07.2020 [79/20.9YRGMR.S1] (*), and CJEU, 27.05.2019, Joined cases C-508/18 and C-82/19 PPU, *OG and PI*, para. 48-49.

[33] Compare STJ, 16.12.2020 [47/20.0YREVR.S1] (*) and CJEU, Joined Cases C-566/19 PPU and C-626/19 PPU, *JR and YC* [ECLI:EU:C:2019:1077], para. 67 – 71.

disproportionate measure did not fall under the remit of the executing MS, but rather the issuing Member State's. A different stance would run counter the principle of mutual recognition and mutual trust underlying the EAW[34].

In some instances, the requested individuals argued that other measures of transnational cooperation (such as the European Investigation Order or the transfer of criminal proceedings) could effectively attain the same goals and would avoid the EAW. Again, the courts found that such evaluation belonged to the issuing MS; executing courts cannot suggest the application of other measures, they can only refuse or proceed with the execution of the EAW, according to the law[35].

In yet another set of situations, Portuguese courts have actually assessed, as executing authorities, the proportionality of the claim submitted by the issuing Member State. In one case, the UK requested an individual for the execution of a sentence of 10 years imprisonment imposed for the sheer failure to comply with the confiscation order included in a conviction for money laundering. The Portuguese court found that the offence at stake (failure to pay the sum) was not included in the catalogue of art. 2(2) PT LEAW (= art 2(2) FD EAW) and that it was not punishable under Portuguese law. Consequently, optional non-execution for lack of dual criminality applied (art. 12(1)(a) PT LEAW = art. 4(1) FD). In the attempt to utilize sensible criteria to decide over the execution of the warrant[36], the Court resorted to the proportionality and necessity of the *sentence* and concluded that the warrant should be refused because the penalty was disproportionate and unnecessary in relation to the offence[37].

In a similar case, the requested individual had been convicted for sex offences in the UK and, as a registered sex offender, had failed to inform the British authorities that he was travelling abroad, thereby committing an offence punishable with a sentence of up to 5 years imprisonment. Although optional non-execution applied, in the terms mentioned in the previous paragraph, the Court ruled that the warrant should be executed (based on the need to prevent sex offences)[38]. Nevertheless, one justice has rightly and vehemently dissented, arguing that the references of the majority to the need to prevent sex offences were "misplaced", not only because the act at stake was a mere administrative offence, but also because the alleged sex offence for which the individual had been convicted would not qualify as a *sex* offence under Portuguese criminal law[39]; consequently, the execution of the warrant was, in the judge's view, disproportionate and unnecessary.

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[34] STJ, 05.11.2014 [ECLI:PT:STJ:2014:115.14.8YREVR.A.S1.0E]; STJ, 11.01.2018 [ECLI:PT:STJ:2018:259.17.4YRPRT.P1.S1.09] and TRL, 07.04.2017 [ECLI:PT:TRL:2017:546.17.1YRLSB.5.00]. In the latter case, the defence argued that the forcible surrender of the suspect was not "necessary"; the Court noted that such contention seemed to presuppose the competence of the executing authority to rule on whether the issuing authority had respected the principle of proportionality. The Court declined to do so, quoting C-396/11, *Radu*, in this respect, and asserted that it was for the issuing authority to perform such control. The Court also quoted in support of this position the recommendations annexed to the European Parliament's "Resolution 2013/2109 (INL), of 27 February 2014"; the authors could not find such document, but the Court probably meant the *Report with recommendations to the Commission on the review of the European Arrest Warrant* (2013/2109(INL)), A7-0039/2014, of 28 January 2014.

[35] TRE, 23.03.2021 [34/21.1YREVR] (*) and STJ, 06.01.2011 [ECLI:PT:STJ:2011:1217.10.5YRLSB.S1.0A].

[36] See infra Section II, 3.

[37] STJ, 14.02.2019 [ECLI:PT:STJ:2019:120.17.2YREVR.S1.40].

[38] See infra, Section II, 3.3.

[39] STJ, 10.01.2013 [ECLI:PT:STJ:2013:77.12.6YREVR.S1.07].

II.1.3. Detention

Decisions keeping or replacing detention can be appealed to the Supreme Court, to guarantee a double degree of jurisdiction[40]. There are three mains issues addressed by the courts: the requirements for applying detention; the maximum time limits of detention; and the discount of the time spent in detention (or other preventive measures) during EAW proceedings (this last question was already addressed in Section I, as the most cases concerned EAW issued by Portugal).

In most cases, the courts have ruled that the requisites for applying detention or preventive measures of deprivation of liberty in EAW proceedings are less demanding than in common criminal procedure. The plain existence of a legally issued EAW is a sufficient ground[41], because detention is *ordered* by the authority of the issuing Member-State and the role of the executing Member-State is merely to keep it under its control[42]; other less intrusive measures that may replace detention are deemed to be "exceptional"[43]. Portuguese authorities are not supposed to assess the necessity of the detention ordered by the issuing Member-State: their task is to ensure the surrender of the individual, and whether or not that goal can be equally achieved through less stringent measures[44]. This has led the Supreme Court to direct a lower court to revoke its decision to apply a less restrictive measure and order the individual's detention instead while taking also into consideration that the EAW had been issued for the execution of the remainder of a 10-year imprisonment sentence for drug trafficking[45]. Indeed, the *purpose* of the EAW seems to exert a significant influence on the decision on whether or not detention should be replaced: the Supreme Court has already ruled that where the EAW aims at the execution of custodial sentences, the executing MS is "almost an extension" of the issuing MS's punitive power and it is permissible to "fiction" that detention is already part of the execution of the penalty[46].

The maximum limits for detention are not contentious, as they are set out in PT LEAW[47]. In contrast, PT LEAW has not transposed art. 23(5) FD EAW[48]; nevertheless, the Supreme Court has rightly ruled that detention must cease once the deadlines set in art. 29(2)-(5) PT LEAW (= art. 23(2)-(4) FD EAW) for surrender after the final decision are exhausted, and it has explicitly relied on the imperative norm contained in art. 23(5) FD EAW[49].

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40 STJ, 11.07.2007 [ECLI:PT:STJ:2007:07P2618.D8] and STJ, 12.07.2007 [ECLI:PT:STJ:2007:07P2712.3F].

41 STJ, 27.07.2006 [ECLI:PT:STJ:2006:06P2953.25] and STJ, 15.03.2006 [ECLI:PT:STJ:2006:06P782.46].

42 STJ, 28.03.2018 [ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E]. But see, in a different direction, STJ, 01.07.2020 [19/20.5JBLSB-A.S1] (*), supra, fn. 26, which (rightly) denies the extraterritorial scope of procedural acts.

43 STJ, 28.03.2018 [ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E].

44 STJ, 28.03.2018 [ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E] and STJ, 09.08.2013 [ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD] (which has dealt with, and rejected, an objection based on the alleged unconstitutionality of the norms allowing for detention); STJ, 22.07.2015 [ECLI:PT:STJ:2015:661.15.6YRLSB.S1.E4]; STJ, 05.11.2014 [ECLI:PT:STJ:2014:115.14.8YREVR.A.S1.0E]; STJ, 21.11.2012 [ECLI:PT:STJ:2012:211.12.6YRCBR.21]; STJ, 25.10.2007 [ECLI:PT:STJ:2007:07P3995.97]; STJ, 20.09.2017 [ECLI:PT:STJ:2017:120.17.2YREVR.S1.41]; TRE, 18.08.2017 [ECLI:PT:TRE:2017:120.17.2YREVR.7A]; STJ, 03.08.2012 [ECLI:PT:STJ:2012:83.12.0YFLSB.S1.E2]; STJ, 28.10.2009 [ECLI:PT:STJ:2009:325.09.0TRPRT.A.S1.EF].

45 STJ, 02.02.2005 [ECLI:PT:STJ:2005:05P141.11].

46 STJ, 20.09.2017 [ECLI:PT:STJ:2017:120.17.2YREVR.S1.41].

47 According to art. 30 PT LEAW, detention shall have a maximum length of 60 days if there is no decision on the warrant, 90 days if the decision by the High Court is appealed to the Supreme Court and 150 days if there is an appeal to the Constitutional Court: see STJ, 25.06.2009 [ECLI:PT:STJ:2009:440.09.0YFLSB.E9].

48 See CAEIRO / FIDALGO (2009), p. 449 f.

49 STJ, 18.04.2013 [ECLI:PT:STJ:2013:301.13.8YLSB.A.S1.5A]. In this case, the second attempt to surrender the individual has been cancelled because transportation by plane was not viable (due to health reasons) and other means were deemed too expensive and time-consuming; the Supreme Court ordered the release of the requested person because detention had

The courts have also made clear that the 10-day period for surrender after the final decision (art. 29(2) PT LEAW) is *not* included in the general deadlines for detention[50]. If detention is kept beyond any of those deadlines, it is a case of illegal imprisonment that can be challenged through the general mechanism of *habeas corpus*. In some cases, the motion for release has become moot, because the Supreme Court has rendered its judgment, rather coincidentally, the day after the individual had been surrendered[51].

II.1.4. Trials in absentia

In many cases regarding alleged trials *in absentia*, the courts conclude that the basic requirements for refusing surrender set by art. 4-A FD EAW (= art. 12-A PT LEAW) were not fulfilled, either because the sought person had been present at the trial[52], or had been duly represented[53] or summoned[54], or had knowledge of the decision[55]. The remaining cases revolve around two issues: whether or not it is necessary to ask for specific guarantees; and the interpretation of art. 4-A(1)(d)(i) concerning the contents of the rights of the sought person.

Before the transposition of art. 4-A into Portuguese law in 2015, there seemed to be two different approaches to the need for "guarantees" mentioned in former art. 5(1) FD EAW: some decisions were satisfied that such guarantees existed as long as the issuing authority provided information, in the EAW, according to which the sought person had the right to request a new trial (or to appeal the decision)[56]; other decisions seemed to require an *ad hoc* guarantee from the issuing authority[57], although in some of them it is not clear whether plain information would also be enough[58]. In one case, surrender was granted on the condition that the rights mentioned in art. 4-A(1)(d) FD EAW would be respected by the issuing MS. Although FD 2009/299 had not yet been transposed into Portuguese law, the Court resorted to the judgment of the CJEU in C-105/03, *Pupino*, to the effect of interpreting the national norm in its light[59]. When asked for a clarification of the judgment, the Supreme Court highlighted that surrender was to be effected immediately, subject to a "resolutive condition": if the issuing authorities failed to act as provided for by art. 4-A(1)(d) FD EAW, the Portuguese courts would unilaterally rescind the decision to surrender and order the return of the individual[60].

already exceeded the maximum limits and there were no substantial grounds to justify it – but allowed the lower court to adopt preventive measures other than detention, if it deemed them necessary.

50 STJ, 10.09.2008 [ECLI:PT:STJ:2008:08P2911.50].

51 STJ, 22.10.2020 [106/20.0YREVR- A.S1] (*); STJ, 09.12.2020 [1211/20.8YRLSB-B] (*).

52 STJ, 16.08.2008 [ECLI:PT:STJ:2008:08P2158.15].

53 STJ, 16.12.2020 [47/20.0YREVR.S1] (*).

54 TRE, 19.08.2010 [ECLI:PT:TRE:2010:118.10.1YREVR.C5]; TRP, 09.04.2014 [ECLI:PT:TRP:2014:82.14.8TRPRT.P1.E9]; STJ, 05.05.2016 [ECLI:PT:STJ:2016:875.15.9YRLSB.S1.90] (which found irrelevant that the defendant had not been represented by a lawyer during the trial, since this does not infringe upon the law of the issuing MS).

55 STJ, 11.08.2006 [ECLI:PT:STJ:2006:06P3073.14].

56 STJ, 06.07.2011 [ECLI:PT:STJ:2011:552.11.0YRLSB.S1.5E].

57 STJ, 10.11.2011 [ECLI:PT:STJ:2011:763.11.8YRLSB.S1.41]; the Supreme Court had some reservations concerning the guarantees, since they had been provided by a prosecutor and not by the issuing "State" (sic) and their terms were dubious. Nevertheless, surrender was granted under certain conditions: see infra in the main text.

58 See STJ, 10-10-2007 [ECLI:PT:STJ:2007:07P3776.E0]; and STJ, 09.01.2008 [ECLI:PT:STJ:2008:07P4856.F1] (upholding TRG, 10-12-2007, unpublished).

59 STJ, 10.11.2011 [ECLI:PT:STJ:2011:763.11.8YRLSB.S1.41].

60 STJ, 23.11.2011 [ECLI:PT:STJ:2011:763.11.8YRLSB.S1.19].

Be it as it may, current art. 4-A of the FD EAW has arguably changed the regime concerning trials *in absentia*: in those cases, surrender "may be refused" unless the EAW itself certifies the existence of several (alternative and cumulative) "conditions"[61]. Hence, contrary to what previous art. 5(1) FD EAW read, there seems to be no place for asking or providing "guarantees" anymore: after the entry into force of art. 12-A PT LEAW in 2015, surrender will be granted if the issuing authority declares in the EAW that, where art. 4-A(1)(d) FD EAW applies, the sought person has the right to a new trial or to appeal the decision[62].

Concerning the *content* of the right upon which surrender is made dependent, former art. 5(1) FD EAW referred to a "right to apply for a retrial of the case", whereas art. 4-A(1)(d)(i) FD EAW (= art. 12-A(1)(d) PT LEAW) explicitly mentions the "right to a retrial, or an appeal".

In a judgment delivered under the former regime, the High Court of Coimbra has found that the notion of "absence" applied not only to the trial but also to the ulterior hearing where the foreign court decided to execute a custodial sentence for breach of the conditions of a suspended sentence. As the defendant had not been summoned to that audience and did not know the decision, the High Court asked for a specific guarantee that he would have the right to appeal the decision. However, the issuing court bound itself to provide the information that, according to the law, the defendant would have the right to appeal the decision if the court gave him leave to appeal. The Portuguese court found that, in that case, the right to appeal was not an actual right, but a "conditional" one, and refused the execution of the warrant[63].

Under the new regime introduced in 2015, there are decisions where the courts require the existence of an actual and unconditioned right to a fresh trial or an appeal[64], whereas others suggest that the right to request them is sufficient[65]. In one case, the judgment of the High Court of Lisbon (upheld on appeal by the Supreme Court) was particularly unclear: a Portuguese citizen to whom the said norms applied was surrendered to Italy to be notified of the conviction/sentence so that she might then "exert the rights Italian law provides for in that situation"[66].

A final note concerning the rights mentioned in art. 4-A(1)(d) FD EAW is that the possibility of exerting them prevents the decision taken in the main proceedings (conviction) from being definitive, which means that surrender cannot be refused on the strength of art. 12(1)(g) PT LEAW (= art. 4(6) FD EAW) because the sentence is not definitive and cannot be executed unless the defendant waives said rights[67]. Nevertheless, if the suspect

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61 See art. 4-A(2)(3).

62 TRE, 07.06.2016 [47/16.5YREVR] (*); STJ, 07.07.2016 [ECLI:PT:STJ:2016:47.16.5YREVR.S1.A7]; in the same direction, STJ, 30.03.2016 [ECLI:PT:STJ:2016:1642.15.5YRLSB.93] and STJ, 09.07.2020 [79/20.9YRGMR.S1] (*).

63 TRC, 03.07.2012 [ECLI:PT:TRC:2012:24.12.5YRCBR.03].

64 STJ, 22.03.2018 [ECLI:PT:STJ:2018:1.17.0YRLSB.S1.77], in a situation where the belated appeal would have to be deemed "justified" by the courts of the issuing MS.

65 TRE, 07.06.2016 [47/16.5YREVR] (*) and STJ, 07.07.2016 [ECLI:PT:STJ:2016:47.16.5YREVR.S1.A7]; in this case, both the High Court of Évora and the Supreme Court were satisfied that the issuing authority had informed, in the EAW, that the defendant had the right to *request* a fresh trial, which, according to the information given by the Italian authorities, would be granted if he/she proved to Italian courts that he/she had no knowledge of the proceedings against him/her.

66 STJ, 10.03.2016 [ECLI:PT:STJ:2016:1240.15.3YRLSB.S1.05]; see also the previous footnote.

67 STJ, 09.07.2014 [ECLI:PT:STJ:2014:220.14.0YRLSB.EF]; TRL, 12.01.2016 (unpublished; mentioned in STJ, 10.03.2016 [ECLI:PT:STJ:2016:1240.15.3YRLSB.S1.05]; but compare CJEU, 21.10.2010, C-306/09 [ECLI:EU:C:2010:626], para. 57-61.

is a Portuguese national, surrender in those cases can be subject to the condition that the suspect is returned to the executing MS for the execution of the eventual sentence to which she might be convicted[68].

II.1.5. Right to translation

Portuguese courts deal with problems of translation as mere irregularities that can be cured and often stress that such defects are no grounds for refusal. In most cases in which the issue has been raised, a translation was eventually produced and filed, curing the irregularity[69]. However, the right to translation in EAW proceedings does not extend to the charges brought by the issuing authority in the main proceedings[70].

In two cases where the issuing MS was Spain, the courts have found that the translation of the EAW to Portuguese was not necessary, given the agreement between the Kingdom of Spain and the Portuguese Republic, of 19.11.1997[71], which dispenses the translation of documents and requests concerning mutual legal aid in civil and criminal matters between administrative and judicial authorities of the two countries[72].

In another case, more precise information had been asked to the issuing authority regarding the date when the offences had allegedly been perpetrated, which might be relevant to establish whether or not the sought person could be criminally liable owing to his age. The document with the reply was received in French and it was not translated; it was notified by post to the suspect and his lawyer as it was, so that he could react, in 10 days, to the new document. The suspect did not react but raised the issue later when he appealed the judgment. The Supreme Court found that the challenge was untimely and that, in any case, the irregularity was cured, because the suspect did not challenge the lack of translation in time[73].

Finally, in a case where the sought person was a French national, the EAW issued by the French authorities, in French, had not been translated to Portuguese at the time of the hearing. The suspect was given 10 days to file his written opposition and his lawyer was provided with a Portuguese translation when there were only two days left for the deadline to expire. On appeal, the suspect argued that the time should be counted from the day the translated version had been made available to his lawyer. The challenge was rejected by the Supreme Court, on the grounds that the appellant had perfectly understood the warrant and the facts contained therein at the hearing and had been served with the EAW in his mother tongue; the fact that his lawyer had access to a Portuguese version of the warrant close to the deadline was deemed irrelevant[74].

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[68] *Ibidem*; this is in line with CJEU, 21.10.2010, C-306/09 [ECLI:EU:C:2010:626], para. 57-61.

[69] STJ, 09.05.2012 [ECLI:PT:STJ:2012:27.12.0YRCBR.S1.09]: the original EAW had not been translated to Portuguese; irregularity cured.

[70] STJ, 20.12.2007 [ECLI:PT:STJ:2007:07P4740.1D].

[71] *Acordo entre a República Portuguesa e o Reino de Espanha Relativo à Cooperação Judiciária em Matéria Penal e Civil*, approved by Government Decree nº. 14/98, of 27.05.1998 (*Diário da República* 27.05.1998, ELI:https://data.dre.pt/eli/dec/14/1998/05/27/p/dre/pt/html).

[72] See TRP, 31.10.2007 [ECLI:PT:TRP:2007:0715689.8]: the court found that the challenge was without merit because there was a Portuguese translation of the EAW in the case-file; but it also mentioned, as a further argument, the existence of said agreement; and TRP, 12.11.2014 [ECLI:PT:TRP:2014:314.14.2TRPRT.P1.CF]: the warrant had been issued in Spanish against a Portuguese citizen, who was informed of its existence and contents while being heard and did not raise the issue at that moment; apparently, the part of the warrant concerning the offences imputed to the suspect was translated afterwards by the Portuguese public prosecutor, who filed a fully translated version one day after the suspect had filed his written opposition to being surrendered.

[73] STJ, 04.03.2009 [ECLI:PT:STJ:2009:09P0685.EF].

[74] STJ, 09.01.2008, [ECLI:PT:STJ:2008:07P4856.F1]. See infra, 7.

II.1.6. Other procedural rights

The judgment mentioned in the previous paragraph raises the issue of whether two days can be considered "enough time" for the lawyer to prepare the defence in the light of EU law[75], even if one adapts the notion to EAW proceedings (opposition to the warrant). The lawyer is not bound to know the foreign language in which the warrant is issued.

In one case, the High Court of Lisbon has heard the suspect based on the information contained in the SIS form. It has requested the original EAW to the issuing State, which, at the end of the day, bore different information on the acts imputed to the suspect, on the dates of perpetration and the procedural stage of the main proceedings (in the meantime, the defendant had been tried *in absentia*). The Court decided to execute the warrant without notifying the suspect or hearing him on the new document. On appeal, the Supreme Court recalled that it was the executing State's duty to enforce the fundamental rights of the sought person and, relying on the Code of Penal Procedure, the Portuguese Constitution and the ECHR, the Supreme Court found that the rights to be heard and to be present at the audience had been violated. Consequently, it annulled all the procedural acts subsequent to the filing of the EAW by the issuing authority, ordering that a fresh audience take place[76].

II.2. Grounds for refusal of surrender

II.2.1. Formal requirements

In cases where the EAW was issued by another MS for the execution of a custodial sentence, there have been diverging decisions by the Portuguese courts on whether the minimum 4 months threshold refers to the sentence applied[77] or to the time that remains to be served (irrespective of the length of the sentence applied)[78].

II.2.2. Refusal of surrender on humanitarian grounds

Unlike the regime of common extradition, humanitarian concerns are, as a rule, no autonomous grounds for refusal of surrender: they can only temporarily suspend the proceedings and only if they are "serious"[79]. In one judgment, the Supreme Court has highlighted that the decision to surrender taken by the lower court "presupposes that detention in the issuing MS will be accompanied by the provision of appropriate medical

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[75] See the Opinion of Advocate General Pikamäe of 15 April 2021, *Criminal proceedings against IS*, C-564/19, ECLI:EU:C:2021:292, para. 81 and 82, with further references to the CJEU's case law.

[76] STJ, 05.04.2006 [ECLI:PT:STJ:2006:06P1197.6C].

[77] In this direction, STJ, 16.01.2020 [ECLI:PT:STJ:2020:36.07.0PEBGC.C.S1], regarding a sentence of 4 months imprisonment; the Court refused to discount to that sentence 1 day of detention which the defendant claimed he had endured at the beginning of the proceedings in the issuing State (which would have decreased the remainder of the sentence to 119 days); surrender granted.

[78] In this direction, TRE, 31.01.2012 [ECLI:PT:TRE:2012:179.11.6YREVR.C6], regarding a sentence of 3 years imprisonment of which there was only a remainder of 72 days left to serve; surrender refused.

[79] STJ, 16.02.2006 [ECLI:PT:STJ:2006:06P569.F0]; STJ, 9.01.2008 [ECLI:PT:STJ:2008:07P4856.F1]; TRC, 9.06.2010 [ECLI:PT:TRC:2010:80.10.0YRCBR.F2]; TRG, 21.12.2010 [ECLI:PT:TRG:2010:11.10.8YRGMR.CA] (relying on art. 23(4) FD EAW and art. 29(4) PT LEAW, on a decision by the Dutch Supreme Court and on an evaluation report authored by the Commission that criticises Italian law for adopting the opposite solution); STJ, 22.07.2015 [ECLI:PT:STJ:2015:661.15.6YRLSB.S1.E4].

care and a suitable prison regime"[80], but it does not seem that this kind of *dictum* carries any actual consequences. However, humanitarian grounds (*in casu*, the protection of the individual's health) can concur as further arguments to justify the refusal of surrender when the formal requisites for optional non-execution set in art. 12(1)(g), PT LEAW (= art. 4(6) FD EAW) are (also) met[81].

A topic deserving separate consideration is how the courts deal with the specific question of whether or not the ground for refusal laid down in article 18(2) LExtr (humanitarian clause)[82] applies to EAW proceedings.

In some judgments, the Supreme Court has answered in the negative, on the basis that PT LEAW regulates exhaustively the execution of EAWs and humanitarian concerns are not enshrined therein as grounds for non-execution[83]. Furthermore, there are suggestions that in those cases the person concerned bears the burden of proof[84]; when there is no evidence of the "danger" he/she would allegedly incur by returning to the issuing Member State, it should be presumed that the latter, including its prison system, complies with fundamental rights and "legality" (sic), in the light of the ECHR and the CFREU[85].

Nevertheless, other decisions point to a slightly different direction.

In case-file no. 134/09.6YREVR, the High Court of Évora has ruled that, as a court, it could not undertake to execute a sentence uttered by a Spanish court to the effects of art. 12(1)(g) PT LEAW (= art. 4(6) FD EAW) because the law does not confer upon the courts such competence and does not provide for a specific procedure to that effect[86]. However, on appeal, the Supreme Court has found that "there is a lacuna" in art. 12(1)(g) PT LEAW, in that it allows the executing MS to refuse surrender and undertake to execute a sentence in certain circumstances ("may refuse"), but does not provide for the criteria to decide over which course of action should be adopted and how to proceed[87]. Hence, the courts must supplement the "omission" of the legislator by construing appropriate criteria that allow them to balance all the relevant values and interests. The Supreme Court has indicated that those criteria can be drawn from domestic law, namely, from art. 40(1) PC (rehabilitation as one of the goals of punishment) and art. 18(2) LExtr[88], which has been deemed of "general application"[89]. Consequently, the Supreme Court has annulled the judgment of the High Court and has instructed it to take into consideration the goals of the execution of the sentence together with the actual living conditions of the individual and determine whether he should be surrendered or serve his sentence in Portugal.

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80 STJ, 22.07.2015 [ECLI:PT:STJ:2015:661.15.6YRLSB.S1.E4].

81 STJ, 26.11.2009 [ECLI:PT:STJ:2009:325.09.0TRPRT.S1.EC].

82 Art. 18(2) LExtr: "Cooperation can be refused if, taking into account the actual circumstances, the deferral of the request can carry serious consequences for the person concerned, due to his/her age, health condition or other motives of a personal nature".

83 STJ, 22.01.2014 [ECLI:PT:STJ:2014:140.13.6YREVR.S1.F3].

84 *Ibid.* But see in a possibly different direction TRE, 21.05.2019 [ECLI:PT:TRE:2019:79.19.1YREVR.49], which, in the absence of any opposition of the requested person, has checked *ex officio* whether the requisites for surrender were met, in a case where the warrant targeted a Portuguese national who might be subject to a life sentence.

85 STJ, 20.06.2012 [ECLI:PT:STJ:2012:445.12.3YRLSB.S1.2F].

86 This judgment is not available; the information is gathered from the excerpts transcribed in the judgment of the Supreme Court, on appeal (see fn. 87).

87 STJ, 10.09.2009 [ECLI:PT:STJ:2009:134.09.6YREVR.64].

88 See fn. 82.

89 STJ, 27.04.2006 [ECLI:PT:STJ:2006:06P1429.F7].

In another case, the Supreme Court has resorted to art. 18(2) LExtr to interpret art. 12(1)(g) PT LEAW (= art. 4(6) FD EAW), namely in what concerns the circumstances in which a foreign suspect (convict) "staying in" the executing Member State should not be surrendered[90]. The court recalled that the mere factual situation of being found in Portugal is (obviously) not enough and that further motives are required to justify the convenience of executing the sentence in Portugal instead of surrendering the individual concerned. The court found that such requirements were met in the case at hand: the appellant, a foreign national, lived together with his partner, a Portuguese national, for over 20 years. The latter was the object of a different warrant for the same acts, but her surrender had been refused (Portuguese nationality) and she was serving the sentence in a Portuguese prison. The couple had two children, both minors of age, who had been committed to an institution in Portugal when their parents were arrested under the warrants. Thus, the Supreme Court found that the location of all those familiar ties in Portugal and the role they could play for the convict's rehabilitation were motives worthy enough to refuse the execution of the warrant and ordered that the penalty be served in Portugal.

II.2.3. Refusal of surrender and protection of human/fundamental rights

The circumstance that the security measure for the execution of which the EAW has been issued (most probably, a *Sicherungsverwahrung*, a security measure of internment for dangerous offenders[91]) was deemed as entailing a violation of human rights by the ECtHR[92] is not a ground for refusal, because it does not relate to "the formal aspects inherent to the execution of an EAW". Such possible violation should be pleaded in the main proceedings in the issuing State[93].

In a case concerning surrender to Spain, the sought person claimed that her fundamental rights would be in jeopardy if surrender was granted because she was suspect of belonging to ETA and the Spanish authorities allegedly subjected such suspects to torture and ill-treatment. Apparently[94], to substantiate her claims, she filed a report from a department of the Basque Government (the content of which is unknown to the authors of this report) and reports of Amnesty International. The High Court of Lisbon seems to have downplayed the former (because it had been issued by the Government "of the province in which ETA's activity is more intense, pressing (sic) and divisive") and, in a rather peculiar argument, it has highlighted that the suspect should acknowledge that also the Spanish State had – just like herself – the right to the presumption of innocence. The Court then noted that in the previous decade (1998-2008) there had been no findings by the ECtHR of violation of art. 3 ECHR by Spain. Moreover, even if such allegation – according to which the Spanish State disrespects frequently and continuously the fundamental rights (granted by the CFREU) of suspected supporters or members of ETA – were true, it would not constitute a serious ground to fear that the suspect would actually be subject to torture or ill-treatment by the Spanish authorities. The suspect appealed the decision and the Supreme Court dealt with the matter in a slightly different way[95]. In the first place, it held (five

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90 STJ, 21.11.2013 [ECLI:PT:STJ:2013:753.13.6YRLSB.S1.FB].

91 See PÖSL / DÜRR (2012), p. 158-181.

92 See ECtHR, *M. v. Germany*, 17.12.2009.

93 STJ, 16.12.2010 [ECLI:PT:STJ:2010:176.10.9YREVR.S1.68]. This judgment was delivered some months prior to the decision of the German Constitutional Court which struck down, as unconstitutional, the norms that provided for the said measure: Federal Constitutional Court, 4.05.2011, No. 2 BvR 2365/09.

94 This judgment is not available; the information is gathered from the excerpts transcribed in the judgment of the Supreme Court, on appeal (see fn. 95).

95 STJ, 25.03.2010 [ECLI:PT:STJ:2010:76.10.2YRLSB.S1.F6].

years before *Aranyosi/Caldararu*) that one ought to distinguish between the cases where a "repeated violation of human rights constitutes an endogenous feature of the system" and the cases that are "mere one-off events, which do not represent a premeditated stance by the public authorities and should only be assessed in themselves and punished". The Court then expanded on mutual trust and shared values, as well as on the existing mechanisms in Europe that allow for a demanding and accurate monitoring of human rights violations, in particular the ECtHR. Eventually, the Supreme Court concluded that "there are no grounds to hold that a Member State of the EU which has committed itself to the respect of human rights allows for a practice that violates them". Reports of ONGs "such as Amnesty International are credible, but they keep nonetheless their segmented nature since they are dedicated to the detection of rogue pathological behaviour, which takes place against the State and not in or by the State".

National rules that prevent the *extradition* of asylum applicants do not apply to the EAW, given the shared responsibility for the common system of asylum and the absence of motives to believe that the individual would be put in jeopardy in France[96]. The court has explicitly relied on an "interpretation guided by EU law" of the domestic norms that prevent the extradition (to third States) of individuals who have applied for international protection, guided by the "letter and the spirit" of FD EAW together with Directives 2005/85/CE and 2013/32/UE [97], as well as on (comparative law) arguments drawn from Spanish law. It concluded that the application for international protection in Portugal by a national of a third state does not prevent the execution of an EAW issued for his/her surrender when the facts that underlie such application bear no relation either with the acts for which the EAW is issued or the motives for which he /she opposes to its execution.

It is not enough to claim, generally, that the execution of the imprisonment sentence in the issuing State will carry a violation of the concerned person's human rights, without any concrete indication of which rights would be violated and why[98].

II.2.4. Dual criminality

When the acts that underlie the warrant fall squarely under the catalogue of art. 2(2) PT LEAW (= art. 2(2) FD EAW), the issue is unproblematic for Portuguese courts[99], even if the decisions sometimes also mention the correspondent domestic norms[100].

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[96] TRL, 7.04.2017 [ECLI:PT:TRL:2017:546.17.1YRLSB.5.00]. This reasoning complies with CJEU, 21.10.2010, C-306/09, *I.B.* [ECLI:EU:C:2010:626], para. 43, although the judgment does not mention it.

[97] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005, p. 13–34; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, p. 60–95).

[98] STJ, 5.05.2016 [ECLI:PT:STJ:2016:875.15.9YRLSB.S1.90].

[99] STJ, 21.07.2010 [ECLI:PT:STJ:2010:586.10.1YRLSB.S1.6E]; STJ, 09.02.2011 [ECLI:PT:STJ:2011:1215.10.9YRLSB.S1.1C]; TRE, 01.12.2014 ECLI:PT:TRE:2014:115.14.8YREVR.6D.

[100] STJ, 29.06.2011 [ECLI:PT:STJ:2011:415.11.9YRLSB.S1.8F]; STJ, 06.07.2011 [ECLI:PT:STJ:2011:552.11.0YRLSB.S1.5E]; STJ, 05.02.2020 [ECLI:PT:STJ:2020:1827.19.5YRLSB.S1]; STJ, 15.04.2021 [792/20.0YRLSB.S2]; in the latter judgment, the Supreme Court resorted explicitly to the judgment of the CJEU in case C-303/05, *Advocaten voor de Wereld VZW*, to the effect of dismissing the objection of the defence according to which the lack of control of dual criminality (art. 2(2) FD EAW) would be contrary to the Portuguese Constitution.

Special reference should be made to a Supreme Court judgment dating back from 2007[101]. The requested individual had taken her child away from the other parent, thus preventing the latter from exerting his parental rights. The issuing MS qualified the act as "kidnapping", ticking the respective box in the form, which would prevent the assessment of dual criminality. The case eventually reached the Supreme Court, which ruled that the executing authority is bound to check whether the acts described in the EAW correspond to a "reasonable and common material dimension" of the catalogue offences indicated ("ticked") by the issuing authority or are rather "manifestly beyond them". The Court stressed that this exercise did not amount to applying the dual criminality rule[102], but rather constituted a verification needed to secure a common understanding of the contents and limits of the areas of criminality enumerated in the catalogue, which in turn justifies dispensing with the control of dual criminality. Since the acts at stake were not included in the catalogue, dual criminality applied – and Portuguese law did not punish those acts, either as kidnapping or as any other offence[103].

In instances where the courts have to ascertain dual criminality, they recall that such requirement is met as long as the *acts* are punishable under the law of both the issuing and executing MS, irrespective of the *legal label* they carry[104]. Dual criminality is not affected by the circumstance that the law of the executing MS requires certain procedural acts (e.g. a formal complaint by the victim) to open an investigation for the offence at stake and the EAW does not mention their existence (in the issuing MS)[105]. There are indeed cases where surrender has been refused for lack of dual criminality[106].

As said, the status of the lack of dual criminality in PT LEAW was ambiguous until 2019[107]. In most decisions, the courts interpreted it as an optional ground for refusal, acknowledging at the same time that the law was contradictory and that it lacked criteria to decide over whether or not a warrant should be executed. Such uncertainty led the courts to *create* their criteria. Three cases can illustrate this exercise:

- The High Court of Évora dealt with a warrant based on the offence of *conspiracy* to subvert the course of justice in a drug-related case, punishable by British law with life imprisonment[108]. The Court found that such offence was not included in the catalogue, nor was it punishable by Portuguese law. Relying on a controversial

[101] STJ, 04.01.2007 [ECLI:PT:STJ:2007:06P4707.71]. See also CAEIRO / FIDALGO (2015), p. 186-187. Neither the first nor the second decision of the High Court could be found.

[102] Two years earlier, the same Court had found that when the issuing State qualifies the criminal acts as an offence included in art. 2(2), Portuguese courts cannot control dual criminality or the appropriateness of the qualification in the light of the former's legislation: STJ, 16.02.2005 [ECLI:PT:STJ:2005:05P559.F1].

[103] In the meantime, parental child abduction has become an offence under Portuguese law: see STJ, 16-12-2020, 47/20.0YREVR.S1 (*).

[104] TRG, 11-12-2006 [ECLI:PT:TRG:2006:2317.06.1.80]; STJ, 16.12.2020 [47/20.0YREVR.S1] (*).

[105] STJ, 18.04.2012 [ECLI:PT:STJ:2012:766.11.2YRLSB.S1.AA].

[106] STJ, 18.04.2012 [ECLI:PT:STJ:2012:766.11.2YRLSB.S1.AA] (violation of probation); STJ, 14.02.2019 [ECLI:PT:STJ:2019:120.17.2YREVR.S1.40] (failure to pay a confiscation order; the Court applied dual criminality together with the principle of proportionality); TRP, 07.03.2012 [ECLI:PT:TRP:2012:32.12.6YRPRT.3A] (driving without a valid insurance). In the latter case, the warrant had been issued for the execution of a joint sentence of 4 months imprisonment for several menial offences. As the execution for driving without valid insurance was refused, the Court – on its own motion – found that the effects of such refusal upon the length of the imposed sentence were unclear. The execution of the warrant as a whole was refused because the sentence to be served would probably be less than 4 months.

[107] See supra, Introduction, 2.3.

[108] TRE, 03-07-2007 [ECLI:PT:TRE:2007:1317.07.1.77]. For an analysis of this judgment, see CAEIRO / FIDALGO (2015), p. 187, f.

interpretation of art. 2(3) PT LEAW (=art 2(4) FD EAW)[109], it concluded that, despite the lack of dual criminality, there was no place for refusing the execution of the EAW, due to the "gravity of the acts" and the "blameworthy personality" of the individual – concerning acts that, it should be recalled, were not an offence under Portuguese law.

In another paradigmatic case, the same High Court executed a warrant issued for the offence of not informing the authorities of the intention of travelling abroad, in violation of the British Sex Offences Act, by a registered sex offender, and the judgment was confirmed, on appeal, by a majority of the Supreme Court[110]. Both courts tried to justify their decision with the need for general and special prevention posed by sex offences (in general), whereas the offence at hand was obviously of a very different nature.

Finally, in a case where the offence underlying the warrant was a "denial of the Holocaust", the Supreme Court acknowledged that those acts, as such, were not punishable by art. 240 PC (*Discrimination and incitement to hatred or violence*). However, it has found the criteria to decide over the execution/refusal of the warrant in art. 2(3) PT LEAW (= 2(4) FD EAW), interpreting the clause "whatever the constituent elements or however it is described" as follows: "irrespective of the actual legal configuration of the offence [under Portuguese law], the point is to determine whether or not the acts at stake harm legal interests worthy enough to be protected by both MS"[111]. This judgment is quite ambiguous because it eventually concludes – rather surprisingly – that the denial of the Holocaust is also incriminated by art. 240(2)(b) PC, which renders the preceding exercise useless.

II.2.5. Applicability of a life sentence in the issuing State

Despite the misleading wording of art. 13(1)(a)[112], Portuguese courts do not seem to ask the issuing authorities for formal and proper *guarantees* regarding the availability, in their legal order, of mechanisms aiming at the non-execution of a life sentence. Instead, they are satisfied that there are sufficient "guarantees" when the issuing authority provides *information* on the regime of life sentences that meets the conditions required. Hence, the High Court of Porto has found that "France has provided *the formal guarantee that its legal order has provisions in its legal system* for a review of life sentences, on request or at the latest after 20 years, as well as measures of clemency..." (emphasis added)[113]. In other cases, the courts simply accept the information provided *ad hoc* by the issuing State as such and deem it enough to rule that the conditions are met[114]. In one case, the Supreme Court was satisfied that a security measure was not perpetual because the issuing State

[109] The Court found that the lack of dual criminality prevents surrender only where the offence is not included in the catalogue *and* is punishable by the law of the issuing State with imprisonment with a maximum limit of less than 3 years.

[110] TRE, 20.11.2012 [ECLI:PT:TRE:2012:77.12.6YEVR.0A] and STJ, 10.01.2013 [ECLI:PT:STJ:2013:77.12.6YREVR.S1.07] (with a dissenting vote by one of the justices: see supra Section I, 2.2.). For a critique of the decisions, see CAEIRO / FIDALGO (2015), p. 189-191.

[111] STJ, 05-07-2012 [ECLI:PT:STJ:2012:48.12.2YREVR.S1.E3].

[112] See supra, Introduction, 2.1.

[113] TRP, 18.01.2006 [ECLI:PT:TRP:2006:0516310.67]; in the same vein, TRL, 15.07.2013 [750/13.1YRLSB.S1] (unpublished); STJ, 9.08.2013 [ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD]; STJ, 13.07.2016 [ECLI:PT:STJ:2016:797.16.6YRLSB.S1.CC].

[114] STJ, 25.02.2010 [ECLI:PT:STJ:2010:42.10.8YFLSB.CF]; TRE, 21.05.2019 [ECLI:PT:TRE:2019:79.19.1YREVR.49].

"had replied in the negative" to the "question posed" in field h) of the Annex (sic)[115]. In another judgment, the court mentions that "the German State has informed that those guarantees [ie., the conditions] exist"[116].

The High Court of Évora has agreed with the issuing authorities (Germany) that a security measure of internment of indefinite length is not a life sentence[117]. Instead, it has equated that measure with the Portuguese "relatively indeterminate sentence", applicable to dangerous offenders[118].

As for the *contents* of the conditions, the courts seem to take the least demanding approach. In the first place, it is not necessary that the issuing State undertakes to modify and shorten the sentence, or apply clemency measures, on request or after 20 years, or has mechanisms in place that necessarily lead to such result. It is enough that there are mechanisms that *might* prevent an actual execution of the applicable/applied life sentence[119]. Such construction is consistent with the FD EAW, which allows MS to condition surrender to the existence of measures "aiming at a non-execution" of life sentences: only where the penalty is mandatory and cannot be reviewed may surrender be refused. It is also in line with the traditional cooperation-friendly stance of Portuguese common courts vis-à-vis classic extradition, even in cases that might involve constitutional obstacles, namely the applicability of a life sentence[120].

In the second place, the courts deem the conditions for surrender to be met even if there are no provisions for a review of the penalty on request or at the latest after 20 years, as long as there are measures of clemency to which the individual can apply[121]. Again, this construction seems compatible with the wording of PT LEAW and FD EAW, but it is arguably too formalistic and renders the clause almost useless.

[115] STJ, 16.12.2010 [ECLI:PT:STJ:2010:176.10.9YREVR.S1.68].
[116] TRL, 31.10.2006 [ECLI:PT:TRL:2006:9297.2006.5.6D].
[117] TRE, 18.11.2010 [ECLI:PT:TRE:2010:176.10.9YREVR.E6].
[118] On this sanction, in English, see CAEIRO / COSTA (2020), p. 388 f.
[119] TRE, 21.05.2019 [ECLI:PT:TRE:2019:79.19.1YREVR.49].
[120] On this, see CAEIRO (1998), p. 9 f; COSTA (2020), p. 202-206.
[121] STJ, 25.02.2010 [ECLI:PT:STJ:2010:42.10.8YFLSB.CF]; STJ, 13.07.2016 [ECLI:PT:STJ:2016:797.16.6YRLSB.S1.CC].

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Portugal

Bearing in mind the caveats pointed out in the Introduction regarding the statistical significance of the decisions gathered, it seems fair to say that, as a rule, Portuguese courts are very cooperation-friendly in the ambit of the EAW. Of the 166 judgments on the merits[122], 120 have granted surrender (40 of them have made surrender conditional upon the return of the sought person for the execution of the sentence – if convicted). There were 47 decisions of refusal of surrender, but in 38 of those decisions the Portuguese authorities undertook the execution of the sentence in Portugal. In conclusion, there were only 9 decisions of plain refusal of surrender (5,4% of all judgments on the merits), based on diverse grounds[123].

It is also striking how the Portuguese courts rely on topics such as "simplicity and swiftness embedded in the EAW mechanism", together with "trust and need for recognition", to maximise cooperation, when they address the challenges brought by the sought person against the execution of an EAW. One cannot avoid the general perception that individual rights weigh less than those interests in dubious cases.

In the same vein, it should be pointed out that the Constitutional Court has declared inadmissible *all* of the 41 appeals that have challenged the constitutional validity of different aspects of the PT LEAW. The decisions rely on diverse grounds, but the vast majority concern the failure to meet the formal requirements to which those appeals are subjected (eg., the need to raise the unconstitutionality issue in the course of the proceedings, before the appeal to the Constitutional Court, by referring precisely and in an unequivocal manner the norm deemed invalid and the norms of the Constitution that it violates). There are certainly more unpublished summary decisions in the same direction, the number of which is unknown, but it is safe to say that the Constitutional Court has *never* assessed on the merits a challenge to the constitutional validity of PT LEAW[124].

In EAW proceedings, Portuguese courts sometimes cite the case-law of the CJEU, but more often than not they use it to provide context and "enrich" the decision, or, in *obiter dicta*, as support for generally accepted ideas such as the *sui generis* nature of the EAW within judicial cooperation, the need for mutual trust among MS or the need to distinguish optional from mandatory grounds for refusal. It is seldom that they resort to a particular CJEU judgment as the overriding argument to decide on a particular issue. A good example of such approach, among many, is a recent judgment by the Supreme Court that quotes the judgment of the CJEU in case C-388/08 PPU, *Leymann and Pustovarov*, concerning the method for ascertaining dual criminality, in a case where the former deems such ascertainment as irrelevant, given that the warrant was based on "catalogue offences" (serious bodily harm)[125].

[122] Please notice that, in 4 cases, the same judgment addresses two or more warrants, which are counted separately for these statistics.

[123] Lack of dual criminality; territorial offences; lack of guarantees regarding the return of a Portuguese national for the execution of the sentence if convicted; execution of a sentence of less than 4 months imprisonment; statutory limitation; lack of guarantees regarding trials *in absentia*.

[124] Such assessment would have to take the form of a "judgment" and all judgments are published on the respective website.

[125] STJ, 05.02.2020 [ECLI:PT:STJ:2020:1827.19.5YRLSB.S1].

Cited jurisprudence with scarce or no relevance to the decision includes the judgments in cases C-120/78, *Cassis de Dijon*[126], C-184/96, *Commission v French Republic*[127], C-105/03, *Pupino* (interpretation of domestic law in conformity with European law)[128]; C-303/05, *Advocaten voor de Wereld VZW*[129], C-66/08, *Kozlowski*[130], C-123/08, *Wolzenburg* (grounds for non-execution)[131]; C-388/08, *Leymann and Pustovarov*[132], C-261/09, *Mantello*[133], C-42/11, *Silva Jorge*[134], C-396/11, *Radu* (grounds for non-execution, EAW for the purpose of prosecution)[135]; C-399/11, *Melloni* (compatibility of art. 4-A FD EAW with the CFREU)[136]; Joined Cases C-411/10 and C-493/10, *NS*, and Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* (rebuttable presumption of respect for fundamental rights) [137]; and C-241/15, *Bob-Dogi*[138].

In contrast, the jurisprudence of the CJEU has been directly applied in STJ, 10.11.2011 [ECLI:PT:STJ:2011:763.11.8YRLSB.S1.41] (supra II., 1.4.), STJ, 19.07.19 [ECLI:PT:STJ:2019:1728.19.7YRLSB.A.A4] and STJ, 16.12.2020 [47/20.0YREVR.S1] (both supra, II., 1.1.), and STJ, 15.04.2021 [792/20.0YRLSB.S2] (supra, II., 2.4.)[139].

A motive for concern is that – as far as it could be established – there has *never* been a referral by a Portuguese court to the CJEU related to the application or interpretation of the law on the EAW. Apparently, Portuguese courts show some aversion to this mechanism. In some cases, refraining from referring the questions raised by the sought persons to the CJEU seems to have been the right decision[140], but there were certainly other issues where a preliminary ruling would have been entirely justified (eg., the problems raised by dual criminality, the sufficiency of guarantees, etc.).

In at least one (quite recent) case, the view taken by the court on the requirements for preliminary rulings is plainly incorrect. The defendants challenged the conformity of domestic law with art. 7(1) of Directive 2012/13/UE and art. 3 of Directive 2013/48/UE and the High Court of Lisbon has ruled that "it is our understanding that the CJEU shall or must be required to decide, by a preliminary ruling, on the validity and interpretation of the acts (…) mentioned in art. 267(b) TFEU, only in respect of the acts that have a binding

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126 ECLI:PT:TRE:2014:115.14.8YREVR.6D.

127 ECLI:PT:TRE:2014:115.14.8YREVR.6D.

128 ECLI:PT:STJ:2013:77.12.6YREVR.S1.07; TRE, 07.06.2016 [47/16.5 YREVR]; ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E; ECLI:PT:STJ:2019:120.17.2YREVR.S1.40.

129 ECLI:PT:TRE:2014:115.14.8YREVR.6D.

130 ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E.

131 ECLI:PT:STJ:2013:962.09.2TBABF.E1.S2.D3; ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD; ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E.

132 ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD; ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E; ECLI:PT:STJ:2020:1827.19.5YRLSB.S1.

133 ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD; ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E.

134 ECLI:PT:STJ:2013:750.13.1YRLSB.S1.DD; ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E.

135 ECLI:PT:STJ:2013:962.09.2TBABF.E1.S2.D3.

136 ECLI:PT:TRL:2017:546.17.1YRLSB.5.00; TRG, 79/20.9YRGMR.S1 and STJ, 09.07.2020 [79/20.9YRGMR.S1]. The latter two judgments refer to the same case, where the defence submitted that art. 12-A PT LEAW violated the Portuguese Constitution. It is interesting to note that both courts dismissed the objection on the basis that art. 4-A FD EAW is in the conformity with the CFREU, quoting *Melloni* in their support. However, neither explained why a challenge to the *constitutional* validity of a *domestic* norm should be entertained through the assessment of the conformity of a *European* norm with the *CFREU*.

137 ECLI:PT:TRL:2017:546.17.1YRLSB.5.00.

138 ECLI:PT:STJ:2018:37.18.3YREVR.A.S1.7E.

139 There is a judgment of the High Court of Évora that resorts explicitly to the CJEU's judgment in Case C-66/08, *Kozlowski*, to the purpose of defining the concept of residence as a ground for refusal (TRE, 01.12.2014 [ECLI:PT:TRE:2014:115.14.8YREVR.6D]). However, this report does not address that particular obstacle to surrender.

140 STJ, 09.07.2020 [79/20.9YRGMR.S1].

nature, such as regulations and decisions*, but not of those which do not bear a binding nature, such as directives, recommendations and advisory opinions*. As a consequence, a preliminary ruling from the CJEU will not be requested" (emphasis added)[141].

As for proportionality, it seems that Portuguese courts tend to assess it when they act as an issuing State, but seldom as an executing MS. In the latter case, proportionality has occasionally served as a complementary criterion to refuse the execution where dual criminality lacked (see Section II, 1.2); however, it should be noted that the Portuguese court referred proportionality to the sentence applied by the foreign court – not to the use of an EAW.

Concerning detention, Portuguese courts do inquire if pre-trial detention is necessary, but, when it comes to the assessment of the respective requirements, they tend to be less demanding than in the ambit of common criminal procedure, in order to ensure compliance with the objectives of the EAW. The limits of the duration of detention are in general respected and upheld by the Courts, despite the circumstance that the FD EAW has not been fully transposed in this regard.

There is diverging jurisprudence concerning the meaning of "guarantees/conditions" regarding trials *in absentia*. In some cases, they are deemed sufficient if the issuing authority provides satisfactory information, in other cases explicit *ad hoc* assurances were requested and failure to provide them has led to the refusal of execution. It is likely that the transposition of art. 4-A FD EAW in 2015 has solved the problem since the law no longer provides for the power to request guarantees. In contrast, the precise contents of the conditions seem to remain an open question: some courts are satisfied that the sought person has the right to request a new trial, others demand that he/she is actually granted a new trial (or appeal).

Deficiencies relating to the right to translation are consistently viewed by Portuguese courts as mere irregularities that can be – and in most cases are – cured. Contrary to what the Supreme Court has decided, it is more than doubtful that international covenants with other MS (eg Spain) can preclude the right to translation embedded in the EAW. Those covenants are established to simplify the horizontal proceedings between the relevant national authorities and arguably cannot set aside an individual right granted by EU law. On occasion, the courts may have disrespected the right to translation, with some impact on the rights of the defense.

Until 2019, lack of dual criminality was both a mandatory and an optional ground for refusal in Portuguese law, due to an obvious mistake in the transposition of the FD EAW. Such a mistake was at the origin of contradictory and unfortunate decisions and the literature has pointed it out quite early. Nevertheless, it took more than 15 years for the legislator to correct it: eventually, the ambiguity has been clarified in 2019 and it is now clear that there is no surrender for acts that do not fulfil the requirements of art 2(2) PT LEAW / FD EAW and are not punishable under Portuguese law. However, two problems remain.

In the first place, the construction of the Supreme Court according to which dual criminality in the ambit of the EAW can be affirmed if the *legal interest* protected by the actual incrimination in the law of the issuing MS is also protected by the law of the executing MS cannot be accepted. This is not a reasonable meaning of dual criminality and it relies on a flawed interpretation of art. 2(3) PT LEAW (= 2(4) FD EAW): in those cases, it is

[141] TRL, 23.04.2020 [18/20.7JELSB-B.L1-9].

clearly not a situation where "*the acts* for which the European arrest warrant has been issued *constitute an offence* under the law of the executing Member State" (emphasis added). Moreover, this flawed interpretation is in blatant contradiction with the case law of the CJEU on the matter[142].

In the second place, the construction according to which art. 2(3) PT LEAW applies only where *none* of the conditions set out in art. 2(2) is present is also erroneous: the "offences (…) covered by paragraph 2" are only those that pertain to the areas of criminality described *and* are punishable with a custodial sanction of at least three years, as it is clear from the wording of art. 2(2) PT LEAW ("The following offences, if *they* are punishable (…)"; emphasis added).

As for surrender in cases where a life sentence/ detentive measure of indefinite length might be applied, and notwithstanding the "constitutional exception" granted to the EAW in art. 33(5) CRP, one would expect a more cautious approach from the courts, given the long-standing opposition of Portuguese law to those sanctions (abolished in 1884) and to cooperation that might lead to their application[143]. There might be the need to establish a distinction between *legal* mechanisms that allow for ("aiming at…") a review of the penalty in the legal system of the issuing MS (the existence of which arguably suffices to grant surrender) and measures of *clemency*. As there are virtually no states where the possibility of commutation or pardon by the political bodies (*acte de grâce*) is completely excluded, the safeguard contained in art. 5(2) FD EAW would be devoid of effect if the sheer possibility of benefitting from measures of clemency as such was deemed to meet the condition set in that provision. Arguably, the *practice* of the issuing MS regarding their actual application should also be assessed, in terms that the condition should be viewed as fulfilled only when there is an actual prospect that the life sentence will not be executed.

[142] CJEU, 11.01.2017, C-289/15 [ECLI:EU:C:2017:4], para. 54: "where the *factual elements underlying the offence*, as reflected in the judgment handed down by the competent authority of the issuing State, *would also*, *per se*, *be subject to a criminal sanction* in the territory of the executing State if they were present in that State" (emphasis added).

[143] The prohibition to extradite in those cases has explicit legal status since 1991 and constitutional rank since 1997. However, the prevailing opinion in the literature refers it back (albeit in implicit terms) to the 1982 reform of the Constitution, which has established an explicit prohibition to extradite in cases where the death penalty is applicable: see CAEIRO (1998), p. 18 f., with further references.

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